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SUPREME COURT U.S.
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No. _____

In the Supreme Court of the United States

FREDERICK H. BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S SUPPLEMENTAL APPENDIX

FREDERICK H. BROWN
pro se

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APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed September 27, 1999]

No. 96-3933
Section "F"

FREDERICK H. BROWN)
)
v.)
)
UNITED STATES OF)
AMERICA, ET AL.)
)

JUDGMENT

For the written reasons of the Court on file herein, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, United States of America, United States Air Force and David Standish, and against plaintiff, Frederick H. Brown, dismissing plaintiff's suit.

New Orleans, Louisiana
27th Day of September, 1999

/s/_____
Martin J.C. Feldman
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed September 23, 1999]

Civil Action
No. 96-3933
Section "F"

FREDERICK H. BROWN	)
	)
v.	)
	)
UNITED STATES OF AMERICA, ET AL.	)
	)

ORDER AND REASONS

Before the Court is the government's Motion to Dismiss and/or Motion for Summary Judgment. For the reasons that follow, the Motion to Dismiss is GRANTED.

Background

Captain Frederick Brown was employed as an Air Reserve Technician. This hybrid military-civilian position is one of a military reservist, with a military rank in a specific

reserve unit, but who is also a civilian technician. As a condition of his civilian employment, Brown was required to be a military member of the Air Force Reserve.

In June 1992, Brown was ordered by his commanding officer, illegally, as he contends, to report for psychiatric evaluation. He was subsequently diagnosed with a severe personality disorder. He alleges that his commanding officer, in violation of Air Force regulations, prejudiced the evaluation by providing false reports of Brown's behavior. In that same evaluation he was classified "S-1, fully qualified for worldwide duty, with no duty restrictions."

In April 1993, the Air Force initiated a discharge proceeding against Brown under Air Force Regulation 35-41, Separation Procedures for US Air Force Reserve Members. The charge cited Brown with misconduct and substandard performance of duty. Brown was honorably discharged in January 1994. As a result of his loss of military reserve status, he no longer met a basic qualification for his ART position. He requested to be allowed to resign instead of being separated, and was permitted to do so; his resignation was effective July 1994. He served for twenty-one years and was about four and a half months from retirement; he was not offered the chance to retire.

Brown sues under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. He alleges that he was discriminated against on the basis of his race (African-American) in being discharged. He contends that his commanding officer retaliated against him for filing a grievance by illegally ordering him to report for a psychiatric evaluation, and biased the evaluation by providing false

reports of Brown's behavior to the examiner beforehand, in violation of regulations. He contends further that the S-1 classification showed that he was fit for duty, belying the diagnosis of a personality disorder. He maintains that white officers with worse records than his were assigned as his supervisors and that a white officer who was found guilty of larceny was treated preferentially by his commanding officer. He alleges that at his discharge hearing, his evidence rebutting the charges of misconduct were not considered, and that he received ineffective assistance of counsel. Finally, he submits various reports of his excellent performance. Brown seeks compensatory damages, including back pay, salary, and benefits, and also reinstatement and punitive damages.

On October 23, 1998, the Court found Brown's complaint to be non-justiciable, and granted the government's motion for summary judgment. On December 18, 1998, the Court granted Brown's motion for reconsideration, finding that his case should not have been held to the summary judgment standard because he had not been allowed to conduct any discovery. The government now moves to dismiss Brown's claims or for summary judgment. The motion to dismiss is well-taken because of the case literature which cautions intervention by civilian courts' into military decisions.

Law and Application

The Supreme Court has allowed a suit for damages against federal officials who violate an individual's constitutional rights even when there is no statute explicitly allowing such suit. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S 388 91 S.Ct. 1999

(1971). However, the Supreme Court noted that there were "no special factors counseling hesitation." Id. at 395. In Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362 (1983), five enlisted men who served in the United States Navy asserted racial discrimination claims against their superior officers. The high court found that "the unique disciplinary structure of the military establishment and Congress' activity in the field [i.e. Congress' failure to provide a damage remedy] constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers." Id., at 304.

In applying the "special factors" analysis, the Court stated that the degree of disruption the judicial decisionmaking process would have on the military regime should be considered. United States v. Stanley, 483 U.S. 669,682 107 S.Ct. 3054, 3063 (1987). In Stanley the Court held that "no Bivens remedy is available for injuries that 'arise out of or are in the course activity incident to service.'" Id. at 684 (quoting Feres v. United States, 340 U.S. 135, 146, 71 S.Ct. 153, 159 (1950)).

In the Fifth Circuit, the broader "incident to service" test has replaced the four-prong test of Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). Hassenfratz v. Garner, 911 F.Supp. 235, 237-8 (S.D. Miss. 1995). In determining whether a serviceman's injuries are "incident to service," the Fifth Circuit instructs courts to look at the totality of the circumstances, which includes three factors: (1) the duty status of the service member, (2) where the injury occurred, and (3) what function the service member was performing. Parker v. United States, 611 F.2d 1007 (5th Cir. 1980). The

determination should also consider the rationale behind the Parker factors, the most important of which is to "exercise a great deal of caution before requiring the civilian bench and bar to analyze and, in the end, judge military decisions." Miller v. United States, 42 F.3d 297, 301-2 (5th Cir. 1995). See Walker v. United States, 1998 WL 637360 (E.D.La.), aff'd, 184 F.3d 816 (5th Cir. 1999) (dismissing the claims of a former Army Reserve Officer seeking damages for his involuntary release).

Since the employment discrimination claims of Brown, who was a military member of the Air Force Reserve, involve military matters which took place on a military site, the Parker factors are satisfied. There is no doubt that Brown's claims are in the military sphere. Judicial interference in this military personnel decision would violate the rationale behind the Parker test. Brown admits that the reluctance of courts "to interfere in military personnel decisions" weighs against him, obviously, because Brown's discrimination claims are "incident to service" and are non-justiciable.

Brown's claims are non-justiciable, and the Court finds it unnecessary to address the remaining issues.

For the foregoing reasons, the government's Motion to Dismiss is GRANTED.

New Orleans, Louisiana, September 23, 1999.

/s/_____
Martin L. C. Feldman
United States District Court